82-1627

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

THE GREAT SOUTHWEST FIRE
INSURANCE COMPANY, PETITIONER

v.

CHARLES L. ISON, DANIEL C. OTT, DENVER ROOF AND
HOMER ROOF,

RESPONDENTS

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May one standard be applied in determining the liability of an insured, and a different standard applied in determining the coverage afforded by the policy of insurance issued to that insured, to thereby render ineffective, exclusionary provisions of long standing usage in the insurance industry?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, The Great Southwest Fire Insurance Company, prays that a writ of certiorari issue to review the final judgment which was entered in this cause by the United States Court of Appeals for the Sixth Circuit on January 28, 1983.

Petitioner issued a policy of insurance to Parkway Processing, Inc., (Parkway) covering its coal docking facilities at several locations, including Ironton, Ohio. While that policy was in force, a pleasure boat, operating on the Ohio River, collided with a projecting boom which was part of Parkway's Ironton facility. The operator and passengers of the pleasure boat obtained a judgment against Parkway and then filed a supplemental complaint to compel payment, by Petitioner, of the judgment against Parkway. The District Court entered judgment against Petitioner and this judgment was affirmed by the Court of Appeals.

OPINIONS BELOW

Judgment entry of the United States Court of Appeals for the Sixth Circuit (Court of Appeals) (A1 - A2); text of the decision of the Court of Appeals (A3 - A10); Notice of Appeal to the Court of Appeals (A11); text of Memorandum and Order of the United States District Court for the Southern District of Ohio, Western Division (District Court) granting judgment against Petitioner (A12 - A14); Judgment entry of District Court for plaintiffs and cross-claimant against Parkway (A15 - A16); Order of District Court granting judgment against Parkway (A16 - A17); text of Opinion of District Court finding for plaintiffs and cross-claimant and against Parkway (A18 - A42); text of Plaintiffs' Supplemental Legal Memorandum asserting liability of Parkway (A42 - A45).

JURISDICTION

The final judgment of the Court of Appeals for the Sixth Circuit was entered on January 28, 1983. Petitioner, The Great Southwest Fire Insurance Company has caused this Petition to be filed on or before the 28th day of April, 1983, within 90 days of the entry of said judgment by the Court of Appeals for the Sixth Circuit.

The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. Section 2101(c).

STATUTORY PROVISIONS AND REGULATION INVOLVED

33 U.S.C. Sec. 403

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army] prior to beginning the same.
(Mar. 3, 1899, ch 425, § 10, 30 Stat. 1151.)

33 U.S.C. Sec. 409

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such a manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidently or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same,

and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject to same to removal by the United States as hereinafter provided for.
(Mar. 3, 1899, ch 425 § 15, 30 Stat. 1152.)

33 Code of Fed. Reg. Sec. 64.01

(a) The owner of a vessel sunk in the navigable waters of the United States who fails to mark the wreck immediately for the protection of navigation with a buoy or daymark during the day and a light at night may, in addition to being in violation of 33 U.S.C. 409, be liable for resulting damage to the public. The owner of a sunken obstruction other than a vessel which creates an obstruction to the navigable capacity of any of the waters of the United States may, in addition to being in violation of 33 U.S.C. 403, be liable for resulting damage to the public.

(b) The Coast Guard is authorized to mark for the protection of navigation any sunken vessel or other obstruction that is not suitably marked. Marking by the Coast Guard does not relieve the owner of any such obstruction from the duty and responsibility suitably to mark the obstruction and remove it as required by law.

§ 64.01-5 Marking by owners.

Buoys, daymarks, and lights established by owners of sunken vessels or other obstructions to mark such obstructions for the protection of navigation shall conform to the lateral system of buoyage prescribed by Subpart 62.25 of this chapter. Such markings shall be maintained until the obstruction is removed or the right of the owner to abandon is legally established and has been exercised.

33 Code of Fed. Reg. Sec. 95.37

(a) All watercraft, except as herein otherwise provided, navigating any bay, harbor, or river, propelled by hand power, horsepower, or by the current of the river, or which shall be anchored or moored in or near the channel or fairway of any bay, harbor, or river, shall carry one white light forward, not less than 8 feet above the surface of the water.

STATEMENT OF THE CASE

At approximately 11:00 p.m., on June 5, 1977, Homer Roof was operating a 28 foot cabin cruiser on the Ohio River offshore of Ironton, Ohio. He failed to observe, and struck a boom intended for use in Parkway's coal docking facility. A fire ensued, the boat sank and Homer Roof, as well as three passengers, suffered injuries. Suit was brought in the U.S. District Court, Southern District of Ohio, Western Division, Admiralty jurisdiction being asserted. The three passengers sought damages from Homer Roof and four other defendants, including Parkway. Homer Roof cross-claimed against the other defendants.

The following summarizes the findings of fact and conclusions of law made by the District Court, as they apply to Petitioner:

(Facts)

- The boom struck by the pleasure boat comprised part of coal loading mechanism mounted on what had once been a working barge 195 feet in length and 35 feet wide.
- The one time barge was damaged and incapable of floatation and had been in that condition for some five months prior to the accident. It had purposefully been pulled to a stable position on the river bank with a portion of its width projecting into the river. Cables were secured to the barge to assure this fixed position of what had been converted into a component of a coal docking facility.
- The lights on this structure were not illuminated at the time of the accident.
- Ninety percent of the damage arose from the lack of lights and ten percent from the failure of Homer Roof to see the boom.

(Law)

- A claimant, to recover damages for negligence, must show breach of a duty by a tortfeasor and proximate cause to the injuries.
- When a moving vessel collides with a stationary vessel the moving vessel is presumed to be at fault. This presumption is reversed where the stationary vessel is in violation of a safety rule or statute.

- The "barge" was a wrecked vessel, obliged by 33 U.S.C. Sec. 409, 33 CFR Secs. 64.01 and 64.25 to be marked by lights, or a "moored" watercraft obliged to be provided by a lantern, 33 CFR Sec. 95.37. These obligations are to prevent collisions and are to be strictly adhered to.
- The failure to provide lights was a violation of a safety rule.
- Parkway, as owner or party in control of the "barge" is liable for the failure to provide lights.
- Under the rule of comparative negligence Parkway is liable for 90 per cent of the damages sustained.

Judgment was entered against Parkway and in favor of the claimants in the aggregate amount of $253,073.85.

After entry of the judgment and failure of satisfaction, the claimants, pursuant to Ohio law, filed a supplemental complaint adding Petitioner as a party defendant. These proceedings sought to compel payment of the judgment against Parkway, by Petitioner, on the basis of the policy of insurance issued by Petitioner to Parkway and in force at the time of the accident.

Petitioner defended the supplemental complaint on the basis of a policy provision[1] excluding coverage for liability arising from the operation or control of watercraft.

The question of policy coverage was decided by the District Court, without additional evidence, on the record developed in the prior liability proceedings. In its Memorandum and Order filed November 25, 1981 (A18), the

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[1][This insurance does not apply:]

> (e) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of
>
> > (1) any watercraft owned or operated by or rented or loaned to any insured, or
> >
> > (2) any other watercraft operated by any person in the course of his employment by any insured;
>
> but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured; (A12; A13) .

Court held that coverage existed. Accordingly, Petitioner was ordered to pay the judgments rendered against Parkway.

In reaching its conclusion on coverage, the District Court noted that the "barge" was in the same condition at the time the policy issued as at the time of the accident. It also noted that Parkway admitted that the "barge" was a part of its "coal docking facility," the same term as was used in the scheduled Hazzards of the policy. It was then concluded that the intention of the parties (Petitioner and Parkway) was to extend coverage to the "barge."

The Court of Appeals dealt with the appeal from that decision on coverage in summary fashion, adding no further rationale to the conclusions reached, simply "rubber stamped" the opinion of the District Court.

REASONS FOR GRANTING THE WRIT

The decision sought to be reviewed has a significant and widespread impact on essentially all casualty insurance policies, as they are now written. The usual policy contains exclusions, exempting from coverage specific risks which the insurer declines to assume, at least without payment of an additional premium in compensation for the increased exposure for insuring such risks. Faced with the rule that ambiguities in a policy will be construed against the insurer, the use of exclusions is a primary mechanism employed to define the limits of coverage.

Here the "watercraft exclusion" was employed to exclude maritime risks arising from the control and operation of boats and the like. However the District Court's decision (adopted by the Court of Appeals) negated this clear intention of the policy. First liability on the part of the insured,was held to be based on the involved structure, i.e., the one-time barge, being a vessel. The same structure is then found to be a component of a coal docking facility for purposes of holding that coverage exists for the liability thus found. In other words, the "barge" was a "vessel" or "watercraft" for purposes of liability and the same "barge" was a "coal docking facility" for purposes of determining policy coverage.

The anomolous and contradictory conclusions reached were duly brought to the attention of the Court of Appeals, but not addressed by them in their decision.

It is significant to note that the District Court cited no authority for the dichotomy of standards for liability and coverage.

That this is a precedent setting decision is evidenced by the lack of any known prior decision so holding. It is, apparently, the first occasion wherein coverage was found for what would otherwise be an excluded risk.

This does not mean, however, that there is no guidance from analagous authorities. *The Snug Harbor*, 6 46 F. 2d 143 (D.C., E.D. New York, 1930) clearly condemns denoting a structure one thing for one purpose and another thing for a different purpose. (This case was part of complex litigation which twice reached this Court on other issues). There it was attempted to denote a structure as a "wreck" for purposes of jurisdiction and not a "vessel" for purposes of avoiding a statute limiting collectible damages. Such position was correctly rejected with the observation:

> "The contention seems to be that *The Snug Harbor* could at the same time both be a vessel and not a vessel - *a conclusion not tenable either in logic or law."* (emphasis supplied)

It is without question that the "barge" in the present case was, originally a "vessel" or "watercraft." That status, pursuant to the "dead vessel" doctrine had been abandoned and the structure had become a component of a coal docking facility at the time of policy issuance, when the intentions of the parties as to coverage are to be determined. Thus, no inconsistency or ambiguity exists in providing coverage for the coal docking facility and excluding the maritime risks arising from the operation or control of watercraft.

The Court of Appeals declined to distinguish or otherwise acknowledge the rationale set forth in *The Snug Harbor*. The "dead vessel" doctrine was likewise ignored.

One last point illustrates the significance of the instant decision and the fact that different standards were applied in determining liability and coverage. It would not have been illogical to have found that the portion of the "barge" projecting

into the river, constituted a pier. In fact, the claimant's requested the District Court to so find and urged grounds (33 U.S.C. 403) for liability on which could be affixed if such findings were made (A42).

The District Court failed to make such a finding. Thus, the inference is that the District Court found no liability attaching because the coal docking facility projected into the river. Conversely the only supportable basis the District Court could find for holding Parkway liable, was in the breach of a duty incident to the operation or control of a wrecked "vessel" or "watercraft" and, accordingly made that finding.

Notwithstanding the policy exclusion for such a risk, i.e. the operation or control of watercraft, the District Court, in the later proceedings, held that coverage existed because the parties "intended" coverage for the "coal dock facility", of which the "barge" was a component. Again demonstrating the use of different standards for liability and coverage.

The Court of Appeals rejected the argument that the controlling factor should be the mode of use of the structure as a watercraft or as a coal docking facility, and that it could not be both. Thus giving further approval of the "barge" being a "vessel" for purposes of liability and **not** a "vessel" or watercraft for purposes of coverage.

The District Court, with little discussion, alternately found that the exclusion did not apply because its terms were not applicable to a watercraft which is "ashore". However, liability of Parkway was not predicated on breach of a duty imposed on one in control of a "vessel" which was "ashore". Thus the dichotomy of standards persists, the "barge" being a "wreck[ed]" vessel or "moored vessel" for purposes of liability and a "vessel ahsore" for purposes of coverage.

The ramifications of this dichotomy of standards are far reaching and could, potentially, eliminate the effectiveness of what were previously thought to be valid exclusions from coverage of such risks as, operation of aircraft, involvement in racing, discharge of toxic material, the undertaking of indemnification, and engaging in the business of selling intoxicants, in addition to the watercraft exclusion.

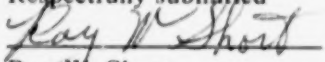
To expand and illustrate one, commonly excluded risk, liability of an insured could be predicated on his conduct being in violation of a "dram shop" law, which necessarily involves being engaged in the business of selling intoxicants. Under the decision sought to be reviewed, the same conduct could then be found **not** to constitute being engaged in the business of selling intoxicants for purposes of coverage. The insurer would then be obliged to indemnify the insured for a risk not calculated in the premium charged to the insured.

In summary, the dichotomy of liability and coverage standards, as espoused in the instant decision is without precedent, "contrary to both logic and law", has a potential affect on virtually all casualty policies as now written, and requires correction by this honorable Court.

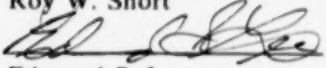
CONCLUSION

Based upon the arguments above, Petitioner requests that this Court grant the Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted



Roy W. Short



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United States Court of Appeals

For The Sixth Circuit

Nos. 81-3199/82-3017

CHARLES. L. ISON; DANIEL C. OTT; DENVER ROOF,
Plaintiffs-Appellees,

-vs.-

HOMER ROOF, Defendant-Appellee,

GREENBRIER COAL CORP.; PARKWAY PROCESSING, INC. (81-3199).
Defendants-Appellants.

GREAT SOUTHWEST FIRE INS., CO. (82-3017).
Defendant-Appellant

Before: MARTIN, Circuit Judge; BROWN, Senior Circuit Before: Judge; and BERTELSMAN, District Judge.

JUDGMENT

On appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the record from the said District Court and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Appellees recover from Appellants the costs on appeal, as itemized below, and that execution therefore issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

By: /s/ Dorothy Phelan
Deputy Clerk

APPENDIX-2

Issued as Mandate: February 21, 1983

COSTS: None
Filing fee .....$
Printing .....$
Total.....$

A True Copy.

Attest:

/s/ Gary McCarthy
Deputy Clerk

Nos. 81-3199, 82-3017

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES L. ISON; DANIEL C. OTT; DENVER ROOF,
Plaintiffs-Appellees,

v.

HOMER ROOF,
Defendant-Appellee,

RONALD BRAMMER; FRANCIS ELKHORN COAL SALES, INC.; LOUIS PINEUR, President,
Defendants,

and

GREENBRIER COAL CORPORATION; PARKWAY PROCESSING, INC.,
Defendants-Appellants.

GREAT SOUTHWEST FIRE INS. CO.,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed January 28, 1983

Before: MARTIN, Circuit Judge; BROWN, Senior Circuit Judge; and BERTELSMAN,* District Judge.

BAILEY BROWN, Senior Circuit Judge. This is an appeal of a decision of the district court, Honorable David S. Porter, holding the owners and operators of coal loading equipment, which extended from the bank and over the Ohio River, liable to the owner of a pleasure craft and his guests. The craft struck the equipment, causing personal injuries and property damage. Following such entry of judgment, the district court, in a supplementary proceeding, also determined that the liability insurance carrier whose policy had been issued to one of the owners and operators of the coal loading equipment must pay the judgment rendered against its insured. The owners and operators have appealed the judgment against them, and the insurance company has appealed the judgment against it. We affirm the judgments of the district court.

BACKGROUND

The facts of this case, as found by the district court and supported by substantial evidence, insofar as it is necessary to relate them in disposing of this appeal, may be briefly set out.

On the night of the accident, Homer Roof, the owner of the pleasure craft, was operating it from the flying bridge which was about ten feet above the waterline. On board as his guests were Charles L. Ison, Daniel C. Ott and Denver Roof. Visibility, due to foul weather, was poor. Defendants Greenbrier Coal Corporation (Greenbrier) and Parkway Processing, Inc. (Parkway) had installed a coal loading facility on the Ohio bank of the river at Ironton.

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* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

In this connection, a work barge was used on which was located a boom that supported a conveyor that extended out over the river about eighteen feet. The barge was secured to the bank with cable and, prior to the accident, it had been damaged, had taken on considerable water and had partially sunk, and the inboard side had been pulled on to the bank of the river by use of a tractor. There were no lights on the barge or the conveyor.

As Homer Roof proceeded downstream on the Ohio side of the river, he moved closer to the bank to avoid a tow proceeding upstream. He had consumed some intoxicants but was not intoxicated. Just prior to the accident, his search light picked up the unlighted work barge and then the boat ran under the conveyor and boom, the flying bridge striking them. The boat caught fire, and Homer Roof and his guests abandoned it, making their way to the river bank. The boat sank and the occupants suffered personal injuries.

Ison, Ott and Denver Roof brought personal injury actions in admiralty in the district court for the Southern District of Ohio against Homer Roof and Greenbrier and Parkway. Homer Roof filed a cross-claim against Greenbrier and Parkway to recover for his personal injuries and property damage. The district court, applying the admiralty rule of comparative negligence, determined that Homer Roof's negligence in not keeping a proper lookout caused ten percent of the damages and that the negligence of Greenbrier and Parkway, in not maintaining a light on the barge and conveyor, caused ninety percent of the damages. On this basis, the district court awarded judgments in favor of Ison, Ott and Denver Roof for their personal injuries, ten percent against Homer Roof and ninety percent, jointly and severally, against Greenbrier and Parkway. It also awarded a judgment to Homer Roof for his personal injuries and property damage (less ten percent) against Greenbrier and Parkway.

Thereafter, based on the same factual record, a supplemental complaint was filed by Ison, Ott and the Roofs

against Great Southwest Fire Insurance Co., the liability carrier of Parkway, pursuant to OHIO REVISED CODE § 3929.06, to have the court determine that the coverage of the policy was applicable and that therefore the insurance company was required to pay the judgments against Parkway. Following additional briefing, the district court held that the coverage was applicable and that Great Southwest must pay these judgments.

Greenbrier and Parkway have appealed the judgments against them, Great Southwest has appealed the judgment against it, and the appeals were consolidated in this court.

I

Although it was conceded in the district court that these claims for personal injuries and property damage were properly a subject of admiralty jurisdiction, Greenbrier and Parkway asserted for the first time on appeal that this was not so and that Ohio law, rather than the admiralty doctrine of comparative negligence, should have been applied. We do not agree. The accident occurred on a navigable stream, and while *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U.S. 249 (1972), holds that this fact alone is not enough to support admiralty jurisdiction, it also holds that admiralty jurisdiction is present if "the wrong [bears] a significant relationship to traditional maritime activity." *Id.* at 268. Here the wrong did bear such a relation. Not only were the injured parties traveling by boat on a navigable stream, but also the danger created by this unlighted conveyor protruding from the work barge could only be to craft moving on this navigable stream. Moreover, *Foremost Insurance Co.* v. *Richardson*, —— U.S. ——, 73 L.Ed.2d 300 (1982), supports the proposition that admiralty law applies to pleasure boats as well as commercial craft. We therefore conclude that admiralty jurisdiction was present and that therefore admiralty law applied.

II

Greenbrier and Parkway concede (or at least do not contend otherwise) that if this is properly an admiralty case, the rule of comparative negligence applies.

The district court determined that: "Because of its partially sunken condition, the barge was, at the time of the accident, a wreck obstructing navigable waters [citation omitted]. As such, its owners were obligated by statute and regulations to mark it with lights at night."

The finding that the partially sunken barge was a wreck and was obstructing navigable waters is supported by substantial evidence.

In support of its conclusion that the owners of this barge were obligated to mark it with lights at night, the district court cited 33 U.S.C. § 409 and 33 C.F.R. § 64.01.

33 U.S.C. § 409 provides:

> **§ 409. Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels**
>
> It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to com-

mence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

33 C.F.R. § 64.01-1(a) provides:

Subpart 64.01 — Marking of Sunken Vessels or Other Obstructions

§ 64.01-1 General.

(a) The owner of a vessel sunk in the navigable waters of the United States who fails to mark the wreck immediately for the protection of navigation with a buoy or daymark during the day and a light at night may, in addition to being in violation of 33 U.S.C. 409, be liable for resulting damage to the public. The owner of a sunken obstruction other than a vessel which creates an obstruction to the navigable capacity of any of the waters of the United States may, in addition to being in violation of 33 U.S.C. 403, be liable for resulting damage to the public.

Thus, the conclusion that Greenbrier and Parkway were obligated to mark this partially sunken barge with a warning light is correctly grounded in the statute and regulation.

The district court further concluded that the violation by Greenbrier and Parkway of this statute and regulation required that liability be imposed upon them, citing *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 136 (1874) and *Skidmore* v. *Grueninger*, 506 F.2d 716, 721 (5th Cir. 1975). These cases hold that when a vessel is in violation of a statute intended to prevent collision at the time of the collision, the burden is on that vessel to prove, not only that its violation was not a cause of the collision, but also that it could not have been a cause of the collision.

Thus, we agree with the district judge that there was ample basis to impose liability on Greenbrier and Parkway because of their failure to maintain a light at night on this partially sunken barge that created a hazard to traffic in this navigable stream. We further conclude that the district court's allocation of fault of ten percent to Homer Roof and ninety percent to Greenbrier and Parkway is supported by substantial evidence.

Accordingly, we affirm the judgments against Greenbrier and Parkway.

III

Turning now to Great Southwest's appeal of the decision holding it liable to pay the judgment against its insured, Parkway, it is the contention of the insurance carrier that this was error because the district court found Parkway liable on the theory that the work barge was a "vessel" and because its policy excluded coverage as to injury or damage arising from maintenance or operation of "watercraft."

The declarations in the policy provide that the policy insured "Coal dock operation by means of mechanical apparatus. . . ." The exclusion on which Great Southwest relies provides:

> (e) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of
>
> (1) any watercraft owned or operated by or rented or loaned to any insured, or
>
> (2) any other watercraft operated by any person in the course of his employment by any insured;
>
> but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured . . . .

Great Southwest recognizes the generally accepted rule that any ambiguity must be construed in favor of the insured; its position is that there is no ambiguity here.

The district court pointed out that, while liability against Parkway was determined under the statute and regulation on the theory that the work barge with boom and conveyor was a wrecked or sunken vessel, it does not follow that such was a "watercraft" within the meaning of the policy exclusion. The policy, by the terms of its declaration, was intended to cover risks arising from operation of a coal docking facility, and this work barge and conveyor were an integral part of such facility. Thus, as the district court recognized, the declaration indicated an intent to cover the "operation" which would include the work barge and conveyor. The work barge was in the same condition at the time the policy was issued as it was at the time of the accident. Moreover, the work barge was used as a base for the conveyor and was not intended to be used and was not being used as a transportation vessel. Thus, the district court found, this work barge with the conveyor was not a "watercraft" within the meaning of the policy exclusion.

The district court determined, alternatively, that because the work barge had been pulled partially on the bank, the exclusion did not apply since by its terms it is not applicable to "watercraft while ashore."

We agree with the district court's reasoning and therefore agree with its conclusion that the Great Southwest policy covered this judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHARLES L. ISON, et al.,
Plaintiffs, No. C-1-77-633
-vs- (J. Porter)
HOMER ROOF, et al.,
Defendants.

NOTICE OF APPEAL ON BEHALF OF DEFENDANT, GREAT SOUTHWEST FIRE INSURANCE COMPANY

Notice is hereby given that Great Southwest Fire Insurance Company, a defendant herein, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order rendering judgment for the plaintiffs and cross-complainant against Great Southwest Fire Insurance Company, defendant, entered in this action on the 25th day of November, 1981.

/s/ Roy W. Short,
Attorney for Defendant
Great Southwest Fire Insurance Company
700 First National Bank Building
Cincinnati, Ohio 45202
(513) 621-2260

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been sent by regular U.S. Mail to Louis F. Gilligan, Esq., 18th Floor, Provident Tower, Cincinnati, Ohio 45202; Bruce B. McIntosh, Esq., 3312 Carew Tower, Cincinnati, Ohio 45202; Michael E. Maundrell, Esq., 900 Central Trust Tower, Cincinnati, Ohio 45202 and Ronald D. Major, Esq., 200 Dixie Terminal Building, Cincinnati, Ohio 45202, this 16th day of December, 1981.

/s/ Roy W. Short

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHARLES L. ISON, et al.,
Plaintiffs No. C-1-77-633

-vs.-

HOMER ROOF, et al.
Defendants MEMORANDUM AND ORDER

PORTER, S.J.:

MEMORANDUM

On February 4, 1981, this Court issued an opinion and order determining liability and assessing damages in this multi-faceted admiralty case (docs. 77 and 78). There remain for consideration by this Court the supplemental complaint of plaintiffs Charles L. Ison, Daniel C. Ott, and Denver Roof, and the supplemental cross-claim of defendant Homer Roof, against defendant Great Southwest Fire Insurance Company. The question is whether an insurance policy issued by Great Southwest to defendants Greenbrier Coal Corporation and Parkway Processing, Inc., contractually obligates Great Southwest to satisfy judgments already rendered in this case against Greenbrier and Parkway. For reasons stated below, we find that plaintiffs and the cross-claimant are entitled to judgment against Great Southwest.

On the night of June 5, 1977, a motorboat owned by defendant Homer Roof collided with a boom extending from a work barge owned and maintained by either Greenbrier or Parkway. The parties agree that Great Southwest policy No. GL 37691 was in effect at the time of the accident and that it covered Greenbrier and Parkway. Great Southwest contends, however, that accidents involving the work barge were excluded from coverage because the work barge was a "watercraft" under policy exclusion (e) (docs. 97, 98, 99).

Only two provisions of the policy need concern us here. Among the risks insured, the declarations page lists "44594-Coal dock operation by means of mechanical apparatus ..." The exclusions page states that coverage shall not apply:

(e) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any watercraft owned or operated by or rented or loaned to any insured, or

(2) any other watercraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured;

The defendant insurance company notes in its brief that the trial court, in its conclusions of law, referred to the work barge as a "colliding vessel" (doc. 77 at 31). Because a dictionary definition of "watercraft" includes ships, boats, and vessels, and because a number of other sources link the terms barge, vessel and watercraft, defendant Great Southwest would have us conclude that the barge was watercraft and therefore was excluded from coverage under the policy.

If Great Southwest's argument were considered in a vacuum, isolated from the facts of this case and the context of the entire insurance policy, it would merit serious consideration. But we are unable and unwilling to ignore findings that we have already made in this case.

As the plaintiffs and cross-claimant correctly point out, the work barge had been severely damaged by ice and had been pulled partially ashore, where it was partially sunk (doc. 77 at 12-13). The barge originally was moored to the shore as part of the coal-loading facility developed by defendant Greenbrier. The boom was an attachment to the barge and supported a conveyor mechanism. The owners of the device described it as a "coal docking facility" (doc. 77 at 10-11).

It is beyond doubt that the barge was part of the "coal dock operation" designated by the parties in the policy as a risk that was intended to be insured. It is equally evident that the barge was not intended by defendants Greenbrier and Parkway for use as a transportation vessel on the Ohio River, and that the barge was in fact incapable of such use at the time of the accident. The barge plainly does not fit Great Southwest's definition of watercraft, and therefore the barge does not fall

within exclusion (e). Accordingly we find that accidents involving the work barge were covered by the insurance policy.

Even if we were to agree that the barge qualified as watercraft, exclusion (e) would not apply, because the barge had been dragged partially ashore after it was damaged. Exclusion (e) specifies that it "does not apply to watercraft while ashore on premises owned by, rented to, or controlled by the named insured."

Great Southwest argues that because this Court previously designated the barge to be a vessel for purposes of establishing admiralty jurisdiction, collateral estoppel prevents the Court from redefining the barge. We do not agree. Plaintiffs and the cross-claimant correctly argue that the intent of the parties was not an issue in our determination of whether the barge was a watercraft under admiralty law. Accordingly we find that the issue decided today was not dealt with when admiralty jurisdiction was determined; therefore, collateral estoppel does not bar today's redefinition of the barge for purposes of construing the insurance policy.

ORDER

For the reasons stated above, judgment is rendered for the plaintiffs and cross-claimant against defendant Great Southwest Fire Insurance Company, which must satisfy judgments already rendered against defendants Greenbrier Coal Corporation and Parkway Processing, Inc.

So ordered.

/s/ David S. Peter
United States Senior District Judge

UNITED STATES DISTRICT COURT
For The
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHARLES L. ISON, et al.,

Civil Action File No. C-1-77-633

Plaintiffs,

-vs- JUDGMENT

HOMER ROOF, et al.,

Defendants

This action came on for trial before the Court, Honorable David S. Porter, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that

1. Judgment is entered in favor of RONALD BRAMMER on all claims against him in this action;

2. Judgment is entered in favor of ELKHORN COAL SALES, INC., on all claims against it in this action;

3. Judgment is entered in favor of HOMER ROOF on the claim made against him by Greenbrier Coal Corporation;

4. Judgment is entered in favor of HOMER ROOF against Greenbrier Coal Corporation and Parkway Processsing, Inc., jointly and severally, in the amount of SIXTY-FOUR THOUSAND, FOUR HUNDRED SEVENTY-SEVEN HUNDRED DOLLARS AND EIGHTY-FOUR CENTS ($64, 477.84);

5. Judgment is entered in favor of DANIEL OTT against Homer Roof in the amount of NINETY-TWO DOLLARS AND THIRTY-ONE CENTS ($92.31) and also against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of EIGHT HUNDRED THIRTY DOLLARS AND SEVENTY- NINE CENTS ($830.79);

6. Judgment is entered in favor of DENVER ROOF against Homer Roof in the amount of ONE HUNDRED FORTY-SEVEN DOLLARS AND FIFTEEN CENTS ($147.15), and also against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of ONE

THOUSAND THREE HUNDRED TWENTY-FOUR DOLLARS AND THIRTY-FIVE CENTS ($1,324.35);

7. Judgment is entered in favor of CHARLES ISON against Homer Roof in the amount of TWENTY THOUSAND SEVEN HUNDRED FIFTEEN DOLLARS AND SIXTY-FIVE CENTS ($20,715.65), and also against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of ONE HUNDRED EIGHTY SIX THOUSAND FOUR HUNDRED FORTY DOLLARS AND EIGHTY-SEVEN CENTS;

8. Costs. Homer Roof is liable for ten percent of plaintiffs' costs; Greenbrier Coal Corporation and Parkway Processing, Inc., are jointly and severally liable for ninety percent of plaintiffs' costs. Greenbrier Coal Corporation and Parkway Processing, Inc., are jointly and severally liable for ninety percent of the costs Homer Roof incurred in prosecuting his cross-claim. No prejudgment interest is allowed.

Dated at Cincinnati, Ohio on this fourth day of February, 1981.

John D. Lyter
Clerk
/s/ Elizabeth Schaeffer/ Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHARLES L. ISON, et al.,
Plaintiffs, No. C-1-77-633

-vs.-

HOMER ROOF, et al.,
Defendants ORDER

This is a maritime tort action arising out of a collision on the Ohio River. A trial to the Court was held on July 7, 8, 9, and 11, 1980. For the reasons set forth in the opinion entered concurrently with this order, judgment shall be entered as

follows:

1. Judgment in favor of Ronald Brammer on all claims against him in this action.

2. Judgment in favor of Elkhorn Coal Sales, Inc., on all claims against it in this action.

3. Judgment in favor of Homer Roof on the claim made against him by Greenbrier Coal Corporation.

4. Judgment in favor of Homer Roof against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of $64,477.84.

5. Judgment in favor of Daniel Ott against Homer Roof in the amount of $92.31 and also against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of $830.79.

6. Judgment in favor of Denver Roof against Homer Roof in the amount of $147.15, and also against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of $1324.35.

7. Judgment in favor of Charles Ison against Homer Roof in the amount of $20,715.65, and also against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of $186,440.87.

8. Costs. Homer Roof is liable for ten percent of plaintiffs' costs; Greenbrier Coal Corporation and Parkway Processing, Inc., are jointly and severally liable for 90 percent of plaintiffs' costs. Greenbrier Coal Corporation and Parkway Processing, Inc., are jointly and severally liable for 90 percent of the costs Homer Roof incurred in prosecuting his cross-claim. No prejudgment interest is allowed.

/s/ David S. Peter
United States Senior District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHARLES L. ISON, et al., **No. C-1-77-633**
Plaintiffs

-vs-

HOMER ROOF, et al.,
Defendants **OPINION**

Porter, S.J.:

This is a maritime tort action arising out of a collision on the Ohio River. A trial to the Court was held on July 7, 8, 9, and 11, 1980. The testimony[1], documents, and arguments presented at trial are discussed below. Our findings of fact and conclusions of law follow that discussion.

DISCUSSION

I.

The incident from which this civil action arose occurred on Sunday, June 5, 1977 just before midnight. At that time defendant Homer Roof and plaintiffs Charles L. Ison, Daniel C. Ott and Denver Roof were in a 28 foot Sportcraft motorboat traveling downstream on the Ohio River near Ironton, Ohio, which is in Lawrence County.

The boat was a cabin cruiser designed for recreational use. It had a fiberglass "flying bridge" which was about eight to ten feet above the waterline. The boat could be operated from the flying bridge as a steering wheel, throttle, electronic depth-finder, and spotlight were located there.

Homer Roof owned the boat at the time of the incident, having paid Charles Ison $15,000 for it a week earlier. Prior to purchasing this boat Homer Roof testified he had owned and operated a 21 foot cabin cruiser for about twelve years. He had not, however, operated a boat on the Ohio River prior to purchasing the boat from Ison. All his boating experience had

[1]Part of the testimony submitted at trial was in the form of depositions. All depositions designated by the parties have been considered in full.

been on Lake Erie. At the time of the incident Homer Roof had about 30 hours of operating experience with the 28 foot boat on the Ohio River.

On Friday, Saturday, and Sunday, June 3, 4, and 5, 1977, Homer Roof and the three other men had been on what amounted to a weekend outing in and around Captain's Cove Marina, which is on the Ohio side of the Ohio River about 12 miles downstream from Ironton, Ohio (px composite #9, charts 128-130). In the early evening of Sunday, June 5, the four men left the others at Captain's Cove Marina and traveled upstream on the Ohio River to do some fishing. They had with them a gasoline lantern and two portable coolers which contained sandwiches, snacks, beer, and whiskey. They first stopped to fish at the Little Sandy River, which flows into the Ohio River from Kentucky. At dusk they traveled about 20 miles farther upstream to the Big Sandy River, which forms the boundary between West Virginia and Kentucky. They arrived after dark.

A rain storm began after an hour or two and at about 11:00 p.m. the fishing party decided to return to Captain's Cove Marina. During their return trip, Ison, Ott, and Denver Roof were seated on the rear deck of the boat, carrying on a conversation by the light of the gasoline lantern. Homer Roof operated the boat from the flying bridge. He testified that the throttle was about one-quarter open during the return trip and that the boat attained a speed of 12 to 15 knots. The boat's depth-finder was operating. Homer Roof first kept the boat within the navigable channel of the river, which is marked by colored buoys (black on the Ohio side, red on the Kentucky side), until he came within the path of an upstream-bound tugboat which had a barge in tow. Homer Roof testified that because of the intermittent rain and fog he had difficulty seeing the barge, which was in front of the tugboat, and that the tugboat flashed its spotlight at him as a warning. Both Ison and Homer Roof testified that after they got out of the path of the tugboat and barge Ison suggested that Homer Roof guide the boat outside of the marked channel. Homer Roof did so, steering it toward the Ohio shore. Homer Roof continued operating the boat downstream. He used the boat's spotlight, shining it in front of the boat and to the starboard side. He testified that while the weather was inclement, the conditions

were not such that he had great difficulty seeing what the light shone on. After leaving the navigation channel Roof said he kept the boat about 30 to 60 feet from shore and, using the depth-finder, in water that was 30 to 40 feet deep.

A short time after the boat passed under the bridge spanning the river from Ironton, Ohio to Russell, Kentucky, which Ison and Denver Roof noted as they went under it, Homer Roof testified that he shone the spotlight to the starboard side of the boat. He said he saw the corner or the side of a barge about 10 to 20 feet away. A moment later the boat stopped suddenly; apparently striking something. Homer Roof said he was catapulted out of the flying bridge and into the water on the port side of the boat.

Ison testified he had been seated on a cooler facing the stern of the boat when it stopped and that he fell backwards with force into the cabin of the boat, hurting his back. Ison testified that he then saw flames in the cabin and on the deck and that he made his way to the side of the boat and jumped into the water. Ott and Denver Roof testified that they too were jarred out of their seats and toward the front of the boat, and then climbed out of the boat and into the water to avoid the fire.

Both Homer Roof and Ott testified that while in the water near the boat they observed that the boat was lodged under a steel boom which extended ten to 18 feet out from a barge. The boom had a conveyor belt on it and both the boat and the conveyor belt were on fire. The boat became dislodged and floated toward the middle of the river; it continued to burn and eventually sank.

The four men made their way toward the Ohio shore, swimming and floating with the current for a distance of about 10 yards. They were met by Ironton police officers and emergency medical services personnel. The police officers had arrived on the scene in response to a radio report from the police and fire department dispatcher that a small boat had hit a barge at the coal loading dock at the foot of Etna Street and the boat was on fire. According to the police and fire department official reports, the dispatcher had received a telephone call from an unknown person on May [sic.] 6, 1977 at 12:01 a.m. describing the incident (Seagraves tr., exh 1; Preston tr., exh. 1).

Officer James E. Preston of the Ironton Police

Department arrived at the gate at the entryway to the Etna Street coal loading dock just after fire fighters from the Ironton Fire Department arrived (Preston tr. 11). The fire fighters had cut the lock on the gate blocking the entryway (Preston tr. 11) and gone on to extinguish the burning conveyor belt at the end of the boom (Seagraves depo. at 6, Smith depo. at 5). Preston began searching the area for the reported accident. He was joined by Ironton police officers Rodney McFarland and Grover Carter, who had arrived shortly after the lock on the gate was cut (Preston tr. 17). McFarland and Carter had been searching close to the river before they joined Preston. McFarland said he saw a boat burning on the river and floating downstream (McFarland tr. 5-6). Using their hand-held lights, they also observed life jackets and thermos containers floating downstream (McFarland tr. 6). Preston heard someone calling for help and the three officers were approached by a man running up from the riverbank who said he and his three buddies had been in the boat and were lying down on the bank (Preston tr. 22).

The officers went to the river's edge and found three men lying among the rocks and weeds, calling for help. The three men lying on the bank and the man who approached the police identified themselves as Homer Roof, Denver Roof, Charles Ison, and Daniel Ott. Officer McFarland observed that one of the men was seriously injured (McFarland, tr. 9). Officer Carter observed that Homer Roof "had a very strong odor of an alcoholic beverage about his person; his eyes were bloodshot and watery; and he had slurred speech" (Carter tr. 23). Carter also observed that two of the other men appeared to have been drinking heavily (Carter tr. 25).

Moments after the three police officers found the four men, an ambulance and emergency medical services (EMS) personnel arrived. The officers assisted the EMS personnel in putting the men on stretchers and taking them to the ambulance. The men were then taken to the Lawrence County General hospital.

At trial there was some controversy as to whether the boat actually hit the boom extending from the barge. We find by a preponderance of the evidence that it did. The strongest evidence in support of this finding is the testimony of police

officers and fire fighters who said that both the boat and the conveyor belt on the boom were on fire. This finding is also supported by the testimony of Homer Roof and Ott that the boat was lodged under the boom.

The most likely scenario is that the boat collided with the boom and became lodged under it. The force of the collision caused the lighted gasoline lantern to fall and break such that the fuel spilled on the deck of the boat and immediately ignited. The flames spread through the boat and onto the conveyor belt which was on the steel boom. With the force of the river's current and the incineration of the boat's structure the boat eventually became dislodged and floated downstream.

There is testimony which gives support to a conclusion that the boat did not hit the boom. Officer Preston testified that when the four men described the incident to him they did not know what they had hit (Preston depo. at 26-27). Dr. Joselito Millan, a neurosurgeon who treated plaintiff Ison, testified that when he spoke with Ison a week after the incident Ison said that the boat "hit a log" (Millan depo. at 7). We do not feel these bits of evidence substantially undercut a conclusion that the boat did hit the boom. The statements of the four men as to what they hit does not contradict such a conclusion, they show only that the men were not sure of what they hit. Ison's statement about hitting a log was made during an examination regarding his physical injuries. Exactly what the boat hit was not important at that time. Also, Dr. Millan's testimony came nearly three years after Ison made the statement and it is doubtful that his memory was very clear on such an unimportant detail. Furthermore, if the boat did not hit the boom, then there is no adequate explanation for the burning of the conveyor belt.

There was also some dispute as to whether Homer Roof was intoxicated at the time of the incident. The testimony of Officer Carter quoted above would certainly support an inference that Homer Roof was intoxicated. We do not doubt that Homer Roof had been drinking; indeed he admitted at trial that he had "one" beer that day. We are unwilling to find, however, that he was intoxicated. His appearance to Officer Carter could be attributed to the shock of the incident and the swim to shore just as easily as it could be attributed to intoxication. The fact that he swam a considerable distance right after the collision also supports an inference that he was

not intoxicated. Furthermore, while Officer Carter was willing to say Homer Roof "had too much to drink," he was apparently unwilling to say that Homer Roof was intoxicated (Carter depo. at 23).

II.

The coal loading dock at the foot of Etna Street in Ironton, Ohio is generally known as Brammer's dock (**see** px composite #9, chart 130). Title to the dock area is held by defendant Ronald Brammer. He testified that a number of years ago the dock area was used for a ready-mix concrete operation. In April, 1970 he obtained a permit from the Army Corps of Engineers to build a dock on the property which would extend about 100 feet into the Ohio River (Gehen depo. exh. 1-6). At the time he obtained the permit Brammer planned to use the dock for unloading sand and gravel from barges. He later decided not to build the dock because he found the river bottom dropped off sharply at the edge of his property and it was possible to pull a barge right up to the shore and unload without aid of a dock.

Sometime after Brammer obtained the permit he removed his ready-mix concrete operation and leased the dock area to defendant Francis Elkhorn Coal Sales, Inc. ["Elkhorn"] for coal loading and storage purposes. Elkhorn apparently never used the land for any purpose and in November, 1976 sublet the land to defendant Greenbrier Coal Corporation ["Greenbrier"] for coal loading and storage purposes (px 3). The sublease document (px 3) states in part, "the LESSEE shall indemnify and save harmless the LESSOR from and against all liability, loss, and expense, of every kind and character, by reason of this Agreement for the operation of LESSEE hereunder." In February, 1977 Greenbrier assigned its rights under the sublease to defendant Parkway Processing, Inc., ["Parkway"] (px 4). The assignment document (px 4) states in part, "the Assignee agrees to perform all the duties set out in said 'SUBLEASE' as above described to the same extent as required by Greenbrier Coal Corporation, and Parkway Processing, Inc., shall, in all respects, be responsible for complying with all said terms in said

'Sublease.'" The sublease referred to is that between Elkhorn and Greenbrier and it ran for 10 years with an option to renew for an additional ten years (px 3, 4).

The stock of Greenbrier and Parkway is owned by Harold Kaufman and Keith Hamner, each of them owning 50 percent of each corporation. Hamner served as president of both entities, Kaufman was also an officer of both. They testified that they treated their business relationship as a partnership.

The dock area consists of a large walled-in lot next to the Ohio River. The wall is a concrete flood wall and access to the lot is through a gate in the wall (Gehen depo. exh. 13 (F)). The lot is flat and covered with gravel except that right next to the river there is a very steep incline about 20 feet to the water's edge (Gehen depo. exhs. 13 (D), 14; French depo. exh. 8). At the top of the steep incline are trees and shrubs (*id.*).

About September 1, 1976 Greenbrier hired Robert E. Brown to develop a coal loading facility on the dock area (Brown depo. 2-3). Brown was eventually made vice president of Greenbrier. Sometime prior to September 1, 1976 Greenbrier purchased a work barge and had moored it at the shore of the dock area, using steel cables to secure it (Brown depo. 86). The barge was approximately 195 feet long and 35 feet wide. It had all steel decking and a steel house over it. Brown testified that the barge had a lot of holes in it and was "practically full of water" when he first saw it (Brown depo. at 6-7). One of his first tasks was to repair it (*id.*).

Welded to the center of the barge was a steel hopper and conveyor apparatus. The conveyor extended from the hopper, which was on the shore side of the barge, out over the river about 15 to 18 feet at an angle of 15 to 20 degrees from the barge deck. At the end of the conveyor, and extending about four feet farther over the water was an adjustable chute for guiding what came off of the conveyor into other barges. The conveyor mechanism was supported by a steel boom and was covered by a sheetmetal housing. The boom was attached to the barge by steel struts welded to the deck and hull. The conveyor and hopper were in the middle of the barge, approximately 100 feet from each end. Brown depo. 7-11; px 10; HR exh 1, 13; Gehen depo. exh. 12(B).

On shore, on top of the steep bank right above the hopper on the barge was a large coal hopper and grinding apparatus.

The purpose of the apparatus was to crush coal dumped into it by trucks and send it through a chute and into the hopper on the barge. Brown depo. at 5; Gehen depo. exhs. 13(D), 14, 16, 20.

Both Hamner and Kaufman described the complex of the grinder, chute, hopper, conveyor, boom, and barge as a coal docking facility. No permit for a docking facility was ever sought from the Army Corps of Engineers by Greenbrier or Parkway. Title to the barge and the other equipment was first obtained by Greenbrier. There was conflicting testimony by Kaufman and Hamner as to whether title to some or all the equipment for the coal docking facility was transferred to Parkway at some time. No evidence was submitted that indicated that Brammer or Elkhorn had anything to do with the purchase or placement of the barge or other coal loading equipment.

On the flat, upper part of the loading area, about 100 feet back from the shore, was a house trailer and scales (Gehen depo. exh. 13(D)). Looking toward the river from the trailer one could not see the barge, only the top of the grinder mechanism (Gehen depo. exh. 13 (D)). Next to the trailer was a utility pole with a white, dawn to dusk light on it. This light shed no illumination on the barge. Farther back from the river, close to the concrete flood wall was an equipment warehouse (Brown depo. at 4; Gehen depo. exh. 13 (E).)

III.

Brown testified that he arranged to have the barge patched and maintained it in floating condition by pumping it weekly (depo. at 11). At the time the barge was floating it had three warning lights attached to it. Two of the lights were at the ends of the barge on steel standards that rose four to five feet above the steel house on the barge. The third light was on a shorter steel standard that was attached to the end of the conveyor. The lights themselves consisted of red-colored glass cylinders, approximately three inches in diameter and six inches tall, with light bulbs inside. Brown depo. at 12-22 and exh. 1; px 1; Gehen depo. exhs. 13B, 13C.

Brown testified that at the time he came to work for Greenbrier the lights were not working. He arranged to have an electrician rewire the red lights at the ends of the barge and put them in working condition. The light on the conveyor boom was not put in working condition at that time. The barge also had

white work lights inside the steel house on the barge which were put in operating condition. These lights, however, were never used, indeed the coal docking facility was never used to load coal or for any other purpose (Brown trans. 12-28).

In mid-February, 1977 the hull of the barge was pierced and damaged by ice flows on the river. Brown, Kaufman, and Hamner testified that the barge partially sank at that time, tipping the deck toward the Kentucky shore. The electrical lines leading to the red lights on the barge were damaged and the lights did not work. To secure the barge Brown rigged a cable around the barge and, with the aid of plaintiffs Ison and Denver Roof, used a bulldozer to move the barge to a more stable position partially on shore. (Brown depo. at 28-36). Ison and Denver Roof apparently lived in the area and did odd jobs at the time.

Later in February, 1977 Brown hired an electrician to rewire the red lights at the ends of the barge and make them operational (Brown depo. at 36). The red light on the conveyor was not put in working order (**id.** at 39).

During March, 1977 the barge was beseiged with floodwaters, ice flows and debris. The debris went over the top of the barge, knocked down the electrical wiring and light standard at the downstream end of the barge. The light on the end of the conveyor boom was submerged. The barge itself remained mostly sunken, the water level inside staying constant with that of the river. (Brown depo. 39-44).

Brown testified that he continued to work in and near the coal loading area until May, 1977. From the time of the March flooding through May the lights on the barge, to Brown's knowledge were not put in working order (Brown depo. at 47-48). Brown left the employ of Greenbrier around June 1, 1977.

Whether the lights on the barge were operating just before midnight on June 5, 1977 was severely contested during trial. In addition to the testimony of Brown, plaintiffs offered the testimony of various police officers and fire fighters who arrived on the scene of the incident on June 6, 1977 just after midnight. Each of those individuals testified that no electrical lights on the barge were operating at the time they arrived (Carter depo. at 14-15; McFarland depo. at 12-14; Preston depo. at 16; Smith depo. at 5-6; Seagraves depo. at 7-11). Officer McFarland testified that during the spring of 1977 he patrolled the part of

Ironton that included the coal loading area daily and that he never observed any lights on the barge until after June 5 (McFarland depo. at 16-17).

The police officers and fire fighters also testified that when they arrived at the coal loading dock the end of the conveyor belt was on fire and that it was about ten feet above the water (Carter depo. at 14-16; McFarland depo. at 10-12; Preston depo. at 13-15; Smith depo. at 9; Seagraves depo. at 3-6, 15). All of these witnesses consistently recalled that the weather was rainy that night (Carter depo. at 18; McFarland depo. at 15; Preston depo. at 13; Smith depo. at 8; Seagraves depo. at 18).

Defendants Greenbrier and Parkway offered testimony from three witnesses which could supply the basis for an inference that the lights on the barge were operating on the night of June 5, 1977.

The first of these witnesses, Henry Keenan, identified himself as a self-employed handyman. He testified that in April of 1977 he was hired by Kaufman to rewire the three red lights on the barge and put them in operating condition. He said that when he rewired the lights Brown was not working at the coal loading dock.

After completing the rewiring, Keenan said he kept an eye on the barge to see that the lights continued to work. He had jobs in and around the Ironton area, and would drive on the Ironton-Russell bridge over the Ohio River and glance in the direction of the barge to notice if any of the lights had burnt out. He testified that on one or two occasions he replaced burnt out bulbs.

Keenan said that during the first week of June in 1977 he was working in Kentucky until after dark every day. He would then drive back to Ironton, Ohio by way of the Russell-Ironton bridge, and look in the direction of the barge. It was Keenan's testimony that on the night of June 5 the lights were working, but he was "not positive" he checked the lights that Sunday night. On Monday, June 6 Keenan said he heard of the accident and went to the barge to reinstall the lights and "remount" the wire. Keenan said he could not recall what the weather was like on the night of June 5, 1977.

Keenan also said that he had done work for Kaufman after June 5, 1977 and that he hoped to do work for him in the future.

The second witness offered by Greenbrier and Parkway was Joyce Wallace, who now works as a dispatcher for the Ironton Police Department. She testified that she and her teenage son were hired by Greenbrier to watch over the loading area at night. They were paid $60 a week. She said that her son would stay at the trailer in the loading area from 4 p.m. until 11:00 p.m. every evening and that it was her habit to drive to the loading area every night at about 11:30 p.m. to see that the lights on the barge were operating. She stated that she had been instructed to call Keenan or Kaufman if she found a light was out, but that she never made such a call because the lights were always working.

She testified that on the night of June 5, 1977 she checked the lights at about 11:30 p.m. and that they were working. She stated that the weather that night was clear. She also testified that while she heard about the boat accident the next day, she never returned to the loading dock area because her son was to handle all the watch duties from there on. She testified that he did so for about two weeks after June 5, at which time he left the employ of Greenbrier.

The third witness was Jeff Wallace, son of Joyce Wallace. He testified that from April to June, 1977, while he was attending Ironton High School, he worked as a watchman at the loading dock area. He said he would stay at the trailer or walk around the area from 4:00 p.m. to 11:00 p.m. every day. At 11:00 p.m. he would either walk home or his mother would pick him up. He said his mother was not in the habit of going to the loading dock area after he left. He testified that he was hired by Kaufman and was told to notify Keenan or Kaufman if any lights on the barge burned out, but that none did. On the night of June 5, 1977 he stated that the lights were working when he left. He said he did not recall what the weather was like that night, but could recall that he had no difficulty seeing. He also stated that June 5, 1977 was the last day he worked for Greenbrier, though he could not recall why he was released or when he was informed of his release.

The testimony of these three witnesses has only one point of substantial agreement, that the barge lights were working on the night of June 5, 1977. On virtually every other point there is either disagreement or lapse of memory. These discrepancies and lapses, particularly as to weather conditions and the need for replacement bulbs, along with the demeanor of the witnesses

while testifying leads us to conclude that their testimony regarding the lights is not trustworthy. We find the testimony of the various police officers and fire fighters, who were disinterested witnesses, deserves greater weight.

IV.

All four of the men in the boat presented evidence regarding injuries and loss suffered as a result of the collision.

Daniel Ott presented records from the Lawrence County General Hospital showing he was admitted June 6, 1977 and discharged June 8, 1977 (Murphy depo. exh. 3). Those records show he suffered a fractured rib and contusion of the left elbow, head, and cervical spine area. Ott testified that he had pain in his neck, shoulder and lower back for about six months. He also said that he was treated by a physician for a few months after his release from the hospital. The total charge for his treatment at Lawrence County General Hospital was $307.70 (px 7). We find the amount that would compensate him for the other treatment he received and the pain and inconvenience he suffered as a result of the collision is $615.40.

Denver Roof presented records from the Lawrence County General Hospital showing he was admitted on June 6, 1977 and discharged on June 8, 1977 (Murphy depo. exh 2). Those records show he suffered a fractured left arm and contusion of the left hip, left leg, left ribs, cervical spine, pelvis, and lumbar spine. He testified that he had pain in his lower back for a substantial period of time after his release from the hopsital. Denver Roof was treated by Dr. Robert W. Lowe, an orthopedic surgeon in Huntington, West Virginia, after he left the hospital. The prescribed treatment consisted of exercise and medication. The total charge for Denver Roof's treatment at Lawrence County General Hospital was $375.50. Dr. Lowe charged him $70 for examinations and $45 for x-rays. We find the amount that would compensate him for the pain and inconvenience he suffered as a result of the collision is $981.

Homer Roof presented records from the Lawrence County General Hospital showing he was admitted June 6, 1977 and discharged June 8, 1977 (HR 3). Those records show he suffered contusion of the right knee, right ankle, right hip, lumbar spine, and thoracic spine. After his release he consulted

Dr. Jose R. Ramirez, a physician in Mansfield, Ohio. Dr. Ramirez directed that he be admitted to Peoples Hospital in Mansfield for diagnosis, observation, and bed rest. Homer Roof stayed at Peoples Hospital from June 10, 1977 until June 14, 1977 (HR 3). Dr. Ramirez testified that Homer Roof had generalized myositis (Ramirez depo. at 8-9). Dr. Ramirez prescribed muscle relaxants and pain medication and referred him to Dr. Richard Stastny, an orthopedic surgeon in Mansfield, Ohio, for evaluation. Dr. Stastny saw Homer Roof on four different occasions and carried out a variety of tests. Dr. Stastny testified that Homer Roof complained of pain in his lower back and had a limited range of motion in his back (Stastny dep. at 13-14). Dr. Stastny prescribed a muscle relaxant, a pain medication, and use of heat on the lower back. Homer Roof also was examined and treated by Dr. Gordon F. Morkel, a physician in Mansfield, Ohio, from November, 1977 until February, 1979. Dr. Morkel found that Homer Roof suffered from rheumatoid arthritis which was exacerbated by the muscle strain sustained in the boating incident. Pain medication and cortisone treatment were prescribed as was the use of a lumbo sacral corset. Dr. Morkel did not release plaintiff to return to work until February 12, 1979 (Morkel depo. at 18).

Documentary evidence submitted by Homer Roof indicates the following charges for medical treatment: Lawrence County General Hospital, $312.30; Dr. J. B. Zimmerman (for reading x-rays), $56; Peoples Hospital, $258.50; Dr. Jose R. Ramirez, $140; Dr. R. C. Stastny, $70; Neurological Associates of North Central Ohio (for test ordered by Dr. Stastny), $50; Dr. Gordon F. Morkel, $199; Hursh Drug (for corsets) $39.95. Thus the total cost of Homer Roof's medical services related to the boating incident is $886.80.

At the time of the boating incident Homer Roof was employed by the Empire-Detroit Steel Division of Cyclops Corporation at its Mansfield, Ohio plant. Doyle Mutti, personnel manager at the plant testified that Homer Roof came to work for Empire-Detroit on April 10, 1965, and has continued his employment with Empire-Detroit Steel since that date. As of June 5, 1977 his regular time pay was $267.48 a week. That rate increased to $294.84 a week from October 1, 1977 until February 1, 1978. From February 1, 1978 until Homer Roof

returned to work on April 10, 1978 the rate was $298.84. Mutti also testified that for a period of time beginning October 13, 1978 and ending February 12, 1979 Homer Roof was off work. Homer Roof's rate of pay as of October 13, 1978 was $315.96. That rate increased to $321.16 a week on November 1, 1978. According to Mutti between June 5, 1977 and October 1, 1977 Homer Roof's regular wages would have amounted to $4,547.70; between October 1, 1977 and February 1, 1978, $5,159.70; between February 1, 1978 and April 10, 1978, $2,838.98; between October 13, 1978 and November 1, 1978, $631.92; and between November 1, 1978 and February 12, 1978, $4,656.82 (Mutti depo at 8-12). Thus the total regular time wages lost by Roof was $17,834.58 (Mutti depo at 12).

We find the amount that would compensate Homer Roof for the pain and inconvenience he suffered as a result of the collision is $37,920.66.

At trial Homer Roof estimated the value of his Sportcraft boat to be $15,000 at the time of the incident. This figure was not disputed. He was unable to salvage the boat.

Charles Ison presented records from the Lawrence County General Hospital showing he was admitted June 6, 1977 and discharged June 10, 1977 (Murphy depo. exh. 1). Those records show he suffered contusion of the forehead, left side of face, left shoulder, left clavicle, left hip, left leg, left ankle and pelvis. One June 15, 1980 he consulted Dr. Joselito Millan, a neurosurgeon and neurologist in Jeffersonville, Indiana. Ison told Dr. Millan that he had pain in his neck, left hip, and left leg. He also said that at times the left side of his face felt strange and that he had headaches in both temples. Dr. Millan testified that upon examining Ison he found a scar near the left ear, which Ison said was caused by a bayonet cut when he was in the military service. Millan found that there was hypersensitivity to pain over the left side of Ison's face. Millan found Ison's neck was limited in its ability to flex and rotate, and also showed pain. Millan also found limited movement in Ison's left hip and leg, and had a weak left hand grip. Millan thought Ison might have cervcial radiculitis and lumbar radiculitis from either a herniated disc or osteoarthritis and possibly facet syndrome. Millan had Ison admitted to the Clark County Memorial Hospital in Jeffersonville, Indiana, on June 15, 1977 for diagnostic tests.

Millan testified that the main reason he ordered an immediate admission was the left facial weakness. Extensive diagnostic testing was carried out. X-rays showed degenerative changes in the cervical spine. Myelograms showed a swollen nerve root at the L4-5 level and a bony bar formation and a possible herniated disc at the C5-6 level. Millan testified that these conditions could cause pain in the neck and arms. Millan said the tests showed Ison had osteoarthritis of the spine and radiculitis in the cervical and lumbar region. The tests also showed that Ison's facial palsy was not the result of a brain tumor or subdural hematoma.

Ison remained in the hospital until July 2, 1977. His treatment consisted of neck traction, low back traction, and physical therapy. Pain and muscle relaxant medications were prescribed.

After he was discharged from the hospital Ison continued to complain of pain in his neck and back. Dr. Millan prescribed a transcutaneous nerve stimulator, which is an electronic device used to treat arthritic symptoms and pain. Dr. Millan also ordered an electromyelogram test which showed nerve irritations at the L4-5 and C5-6 levels of the left side.

Ison continued to complain of pain. He was readmitted to Clark County Memorial Hospital on September 24, 1977 for the purpose of surgery to fuse the C-5, 6 and 7 vertebrae with a bone graft from the hip. After surgery Ison remained in the hospital for recuperation. He was fitted with a cervical collar. Nurses at the hospital reported that Ison removed the collar a few times, which was against Dr. Millan's orders. Medications for pain, nervousness, sleep and muscle relaxation were prescribed. Ison was discharged on October 4, 1977 and instructed to wear a cervical collar.

Ison was next seen by Dr. Millan on October 17, 1977. X-rays showed that the bone grafts implanted between the vertebrae during surgery were displaced. Dr. Millan testified that this displacement was caused by Ison's failure to keep his neck immobilized with the cervical collar. Dr. Millan directed that Ison be admitted to the hospital again for traction treatment. Ison was hospitalized from October 24, 1977 until November 5, 1977. He was discharged with orders to wear a

cervical brace. Again, various medications were prescribed.

Ison was hospitalized again from January 12, 1979 to January 27, 1979 at the direction of Dr. Millan. Ison had been complaining of low back and left leg pain. Bone and internal organ tests were carried out. In addition, another myelogram was done. All the tests showed normal results. Two epidural blocks were carried out for the purpose of stemming back pain. Also, medications for pain were prescribed.

Ison has not been hospitalized since January of 1979. He has continued under the care of Dr. Millan, who continues to prescribe medications for arthritis and pain. Dr. Millan testified that Ison will have to take these medications for the rest of his life. Dr. Millan also testified that Ison has a permanent limitation as to the mobility of his neck and occasional episodes of inability to bend his back forward and backward. Dr. Millan testified that Ison's low back pain is chronic. Dr. Millan has recommended that Ison do no heavy lifting, avoid climbing ladders, avoid prolonged sitting, avoid pulling and pushing heavy weights, and avoid wearing heavy headgear.

Dr. Millan testified that except for the facial palsy, all of the physical problems he treated Ison for stemmed from the boat collision in June of 1977. Dr. Millan in essence said that the boat collision was the event that precipitated Ison's symptoms (Millan depo. at 77, 79, 142). On cross-examination Dr. Millan indicated that Ison had defects in his spine predating June, 1977 (Millan depo. at 116-120). Dr. Millan could not say whether these defects were the cause of Ison's pain, or whether another problem, such as a ruptured disc, caused the pain. The various tests performed could not confirm or deny the presence of a ruptured disc, nor could the fusion surgery (Millan depo. at 120-123).

At the instance of defendant Homer Roof, Ison was examined by Dr. Robert McLaurin, a neurosurgeon in Cincinnati, Ohio, on May 20, 1980. Dr. McLaurin took a medical history and did a 15-minute physical examination, he also reviewed x-rays of Ison 's spine (McLaurin depo. at 17, 24).

Dr. McLaurin testified that Ison had no limitation in the movement of his neck and back. Muscles and reflexes in Ison's legs and arms were also tested and found to be normal. X-rays also showed Ison's spine to be normal, except where the C-5, 6, 7 vertebrae were fused. He found no disturbance of function at

the C-5, 6, 7 level. Dr. McLaurin concluded that Ison would be able to carry out work that required heavy lifting and wearing heavy headgear (McLaurin depo. at 21, 41). Dr. McLaurin also said that the type of injuries that Ison sustained in the boat collision would not make Ison more susceptible to arthritic changes than a person who had not sustained such an injury.

The varying testimony of Dr. Millan and Dr. McLaurin raises two factual issues important to Ison's claim of physical injury. First, whether the extensive medical treatment carried out by Dr. Millan was necessitated by the boat collision. Second, whether Ison is limited in the type of work activities he can carry out. Both witnesses are experts, and both give acceptable rationale for their conclusions. In evaluating such medical testimony, we feel it is appropriate to give greater weight to a treating physician than the testimony of an examining physician. *Cf. Allen v. Califano*, 613 F. 2d 139, 145 (1980). We will therefore find, with one exception, that the boating incident necessitated the medical treatment Ison received from Dr. Millan, and that Ison has the physical limitations described by Dr. Millan. The exception is the post-surgical traction treatment Ison received during his hospitalization from October 24, 1977 until November 5, 1977. As Dr. Millan testified, this treatment was necessitated by Ison's failure to keep his neck immobilized with the prescribed cervical collar.

Documentary evidence submitted by Ison shows the following charges for medical treatment necessitated by the boating incident: Lawrence County General Hospital, $583.20 (px 7); Clark County Memorial Hospital, $5,396.05 (Millan depo. exhs. 3-A, B, D, E, F); Dr. Millan (excluding charges from 10/24/77 to 11/4/77), $3,025 (Millan depo. exh. 2); Dr. Fausto Duque (anesthesiologist), $336 (Millan depo. exh. 4); Radiology Associates, Inc. (x-rays), $557 (Millan depo. exh. 5); Dr. Austin Johson (assistance during fusion surgery), $300 (Millan depo. exh. 6); Dr. Stuart Harlowe (consultant), $35 (Millan depo. exh. 7); Dr. Victor Matibay (tests), $195 (Millan depo. exh. 8); medications, $104.88 (Millan depo. exh. 9). Dr. Millan testified that Ison can expect to pay $5,000 to $10,000 for future medical services related to the boating incident; we find the figure to be $7,500. The total cost of medical services, past and future, for Ison is $18,032.13.

At the time of the incident Ison was a journeyman pipefitter and a member of Local 489 of the Plumbers and Steamfitters Union. He testified at trial that for 9 months prior to the incident he was unemployed. He said that employment as a pipefitter was available to him during that time, but he declined to take it, hoping that a better paying supervisor's job would become available. He further testified that he had arranged to start a pipefitting job on June 6, 1977.

Ison and Paul Davis, business manager for Local 489, testified that a pipefitter must push, pull and lift objects weighing more than a hundred pounds. He must also bend, stoop, squat, sit and stand on the job, and be able to wear a heavy headgear for welding. Davis testified that a person with the limitations described by Ison could not carry out the tasks required of a journeyman pipefitter, but could function as a construction supervisor. Davis said that supervisory positions were much less available than pipefitter jobs.

Ison did not work from June 5, 1977 to March 3, 1977. At that time he found a construction supervisor job. Davis testified that during that period Ison could have worked fulltime as a pipefitter. Davis said that during 1977 the hourly wage for a pipefitter/welder, which was Ison's classification, was $10.50. In 1978 it was $11.50. In 1979 it was 12.50. On the basis of a forty-hour work week we calculate Ison's lost wages in 1977 were $12,600; in 1978 they were $23,920; and in 1979 they were $4,500 -- a total of $41,020.00.

We find the amount that would compensate Ison for the pain and inconvenience he suffered as a result of the collision is $118,104.39. We further find that Ison's earning capacity has been decreased because he is unable to pursue his trade, and that the amount of $30,000 would compensate him for his disability.

No other party besides the four men in the boat offered evidence on damage.

V.

Because of the nature of the law that must be applied in this action, we must make a factual assessment as to the comparative contributions of various factors to the damage that resulted from the boating incident. We find from a

preponderance of the evidence that 90 percent of the damages arising in this case resulted from the lack of lights on the barge and ten percent of the damages resulted from Homer Roof's failure to see the conveyor belt boom.

FINDINGS OF FACT

1. Just before midnight on June 5, 1977 the 28 foot Sportcraft motorboat owned by Homer Roof collided with the steel conveyor belt boom extending from the work barge at the shore of the coast loading dock area at the foot of Etna Street in Ironton, Ohio. At the time of the collision it was dark and the weather was rainy.

2. Homer Roof was operating the boat at the time of the collision. He shone a spot light on the starboard (Ohio) side of the boat and in front of the boat. He saw the side of the barge but did not see the boom extending from it.

3. The work barge was owned and maintained by either Greenbrier or Parkway. The evidence presented does not permit a finding as to which of the two was actually responsible for its condition. The loading dock area was owned by Brammer who leased it to Elkhorn. Elkhorn subleased to Greenbrier, and Greenbrier assigned its rights to Parkway. Neither Brammer nor Elkhorn was in possession of the loading dock area at the time of the collision. Neither Brammer nor Elkhorn had anything to do with the placement or maintenance of the barge.

4. At the time of the collision the barge was partially sunken and partially ashore.

5. No warning lights or work lights were operating on the barge at the time of the collision. The dawn-to-dusk light near the trailer on the upper part of the loading dock area shed no illumination on the barge.

6. The collision caused the boat to become lodged under the boom and to start on fire. The collision also caused the four men in the boat to exit the craft. The boat eventually became dislodged and floated downstream, burning. The boat was never recovered.

7. As a result of the collision Daniel Ott suffered compensatory damages in the amounts of $307.70 for medical services and $615.40 for pain and inconvenience -- a total of $923.10.

8. As a result of the collision Denver Roof suffered compensatory damages in the amounts of $490.50 for medical services and $981.00 for pain and inconvenience -- a total of $1471.50.

9. As a result of the collision Homer Roof suffered compensatory damages in the amounts of $886.80 for medical services, $17,834.58 for loss of wages, $37,920.66 for pain and inconvenience and $15,000 for the total loss of his boat -- a total of $71,642.04.

10. As a result of the collision Charles Ison suffered compensatory damages in the amounts of $18,032.13 for medical services, $41,020 for lost wages, $118,104.39 for pain and inconvenience, and $30,000 for disability -- a total of $207,156.52.

11. Ninety percent of the damages arising in this case resulted from the lack of lights on the barge and ten percent of the damages resulted from Homer Roof's failure to see the conveyor belt boom.

CONCLUSIONS OF LAW

This action was initiated by the complaint of plaintiffs Charles Ison, Daniel Ott, and Denver Roof against defendants Homer Roof, Ronald Brammer, Francis Elkhorn Coal Sales, Inc. [Elkhorn], Greenbrier Coal Corp. [Greenbrier], and Parkway Processing, Inc. [Parkway] (doc. 1). The complaint alleges that Homer Roof failed to keep a good lookout when operating the boat, and that the other defendants failed to mark the barge with proper warning devices. Greenbrier cross-claimed against Homer Roof for damages to the barge and for indemnity (doc. 23). Homer Roof cross-claimed against the other defendants for damages (doc. 27) and indemnity (doc. 33b). Elkhorn and Brammer cross-claimed against the other defendants for indemnity (docs. 30, 31).

Exercise of this Court's admiralty jurisdiction over the subject matter of this action is not contested. 28 U.S.C. § 1333; 46 U.S.C. § 740; Fed. R. Civ. P. 9(h); *St. Hilaire Moye v. Henderson*, 496 F. 2d 973 (8th Cir. 1974); *Ingram Corporation v. Ohio River Company*, 382 F. Supp. 481 (S.D. Ohio 1973), aff'd 505 F. 2d 1364 (6th Cir. 1974); 1 *Benedict on Admiralty* § 144 (1974). This jurisdiction allows us to recognize claims for

personal and property injury suffered as a consequence of negligence, which is the basis of the claims made in this action. 2 *Benedict on Admiralty* §§ 4, 6, 10, 12.

It is hornbook principle that in order for a claimant to recover damages on the basis of negligence he must show the alleged tortfeasor breached a duty to conform to a specific standard of conduct, and that claimant suffered injury proximately caused by the breach. W. Prosser, *Law of Torts* 4th Ed., § 30 (1971).

Application of this principle to the facts of this action leads us to focus primarily on two sets of claims, those against Parkway and Greenbrier and those against Homer Roof. Before examining these claims, however, we will dispose of the claims against Brammer and Elkhorn and the claim of Greenbrier against Homer Roof.

As noted in the findings of fact, Brammer and Elkhorn were, respectively, title holder and lessee of the coal dock area where the work barge was located. There was no evidence that Brammer or Elkhorn occupied the property at the time of the incident, or that they had anything to do with the purchase of the barge or with its being moored to the shore of the lock area. Furthermore, there was no evidence that either of them had anything to do with the condition or maintenance of the barge. On the basis of the evidence presented, neither Brammer nor Elkhorn had any duty to the men on the boat to light, mark or otherwise maintain the barge. At common law, and we are aware of no contrary doctrine in admiralty, an owner or sublessor out of possesion or control may not be held liable for injuries occurring as the result of conditions which develop or are created by a tenant after possession has been transferred. Porsser, *supra,* S 63 at 400; *see Thrash v. Hill* , 63 Ohio St. 2d 178 (1980). The lease agreements signed by Brammer and Elkhorn did not provide for any such responsibility. Hence neither of them is liable for the injuries suffered by the men in the boat. Judgment shall be entered in their favor.

As for Greenbrier's claim against Homer Roof for damages to the barge, no evidence of injury was presented. Indeed, Greenbrier, argued at trial that Homer Roof's boat did not hit the barge. We found, of course, the opposite. Since no damage to Greenbrier was proven, judgment in favor of Homer Roof shall be entered on that claim.

Given our finding that either Parkway or Greenbrier had control and possession of the barge and that 90 percent of the damages arising in this action resulted from the lack of lights on the barge, the legal liability of Parkway and Greenbrier for those damages is the most important issue in this case.

When a moving vessel collides with a stationary vessel, the moving vessel is presumed to be at fault. *The Oregon*, 158 U.S. 186 (1894). This presumption is reversed, however, when one of the colliding vessels is in actual violation of a safety statute or regulation intended to prevent collisions. In such a case the offending vessel will be presumed to be at fault, and in order to escape liability the vessel must show not only that the violation did not cause the collision but that the violation could no have caused the collsion. *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 136 (1874); *Skidmore v. Grueninger*, 506 F. 2d 716, 721 (5th Cir. 1975).

As noted in our findings of fact, no lights were operating on the barge maintained by Greenbrier or Parkway at the time of the incident. Because of its partially sunken condition, the barge was, at the time of the incident, a wreck obstructing navigable waters. *Humble Oil & Refining Co. v. Tug Crochet*, 422 F. 2d 602 (5th Cir. 1970). As such, its owners were obligated by statute and regulations to mark it with lights at night. 33 U.S.C. S 409, 33 C.F.R. SS 64.01, 64.25. Even if the barge was viewed as merely a moored watercraft, there was an obligation to have a lighted lantern on it. 33 C.F.R. Sec. 95.37. These statutory and regulatory obligations were obviously imposed for the purpose of protecting other vessels from collision, and they are to be strictly adhered to. *Ingram Corporation v. Ohio River Company, supr. United States v. The Raven*, 500 F. 2d (5th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975).

By failing to maintain lighted lanterns on the barge Greenbrier or Parkway violated safety rules intended to prevent collisions. The evidence presented at trial in no way allows a conclusion that the violations could not have caused the collision. As noted in the findings of fact, the lack of lights on the barge in fact caused 90 percent of the damages arising in this case. Because we cannot determine whether it was Greenbrier or Parkway that had responsibility for maintaining the barge at the time of the incident, judgment shall be entered against both of them jointly and severally for 90 percent of the damages suffered by Ison, Ott, Homer Roof and Denver Rood.

The remaining claims we must decide are those of the plaintiffs against Homer Roof. At the time of the collision Homer Roof was at the controls of his boat. As the operator of a motorboat he had a duty to his passengers to exercise due diligence and maritime skill. See cases collected at 63 ALR 2d 343, S 3[a] (1959) and later case service. Part of this duty is an obligation to keep a proper and efficient lookout in every direction from which danger might reasonably be expected to arise. *Stevens v. United States Lines Co*, 187 F. 2d 670 (1st Cir. 1951); *The Calalina*, 95 F. 2d 283 (9th Cir. 1938).

As noted in our discussions and findings of fact, Homer Roof was operating a spotlight just before the collision, shining it toward shore and ahead of the boat. Nevertheless he failed to see the conveyor belt boom and just glimpsed the barg. From these facts we must conclude that he was not keeping an efficient watch for possible danger. The obligation of keeping a proper lookout includes seeing as well as looking. Homer Roof thus breached his duty to his passengers to exercise due diligence and skill.

Homer Roof's breach of duty was in fact part of the cause of the collision with the barge. As noted in our findings of fact, ten percent of the damages arising in this case resulted from this failure to see the boom. Judgment shall be entered against him for tn percent of the damages suffered by Ison, Ott, and Denver Roof.

There was some suggestion at trial that plaintiffs Ison and Denver Roof should be held contributorily liable because they fialed to warn Denver Roof of the location of the barge. They testified that they had knowledge of the barge because they had helped to pull it partially ashore about five months before the collison. They also testified that they did not recall their knowledge of the barge the night of the collision. We are aware of no authority for holding a boat passenger liable for not warning the operator of a possible danger. Hence, Ison and Denver Roof will not be held liable in any way.

In this opinion we have noted the varying degrees of fault on the part of certain parties. We did so in reliance upon the comparitive negligence doctrine announced in *United States v. Reliable Transfer Company*, 421 U.S. 397, 411 (1975):

> We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages [*sic*] is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

Subsequent cases have held this doctrine does not affect the burden of proof rule established in *The Pennsylvania, supr. Crown Zellerbach Corp. v. Willamette-Western Corp.*, 519 F. 2d 1327 (9th Cir. 1975); *Alamo Chemical Transpo. Co. v. M/V Overseas Valdez*, 398 F. Supp. 1094 (E.D. La. 1975); V. Schwartz, *Comparative Negligence* S 3.3 (1978 supplement).

In conclusion, we hold that judgment in this case should be entered as follows:

1. Judgment in favor of Ronald Brammer on all claims against him in this action.

2. Judgment in favor of Elkhorn Coal Sales, Inc., on all claims against it in this action.

3. Judgment in favor of Homer Roof on the claim made against him by Greenbrier Coal Corporation.

4. Judgment in favor of Homer Roof against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of $64,477.84.

5. Judgment in favor of Daniel Ott against Homer Roof in the amount of $92.31 and also against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of $830.79.

6. Judgment in favor of Denver Roof against Homer Roof in the amount of $147.15, and also against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of $1324.35.

7. Judgment in favor of Charles Ison against Homer Roof in the amount of $20,715.65, and also against Greenbrier Coal Corporation and Parkway Processing, Inc., jointly and severally, in the amount of $186,440.87.

8. Costs. Homer Roof is liable for ten percent of plaintiffs' costs; Greenbrier Coal Corporation and Parkway Processing,

Inc., are jointly and severally liable for 90 percent of plaintiffs' costs. Greenbrier Coal Corporation and Parkway Processing, Inc., are jointly and severally liable for 90 percent of the costs Homer Roof incurred in prosecuting his cross-claim. No prejudgment interest is allowed.

/s/ David S. Peter

United States Senior District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHARLES L. ISON, et al.,
Plaintiffs,
-vs.-
HOMER ROOF, et al.
Defendants

Case No. C-1-77-633
PLAINTIFFS' SUPPLEMENTAL LEGAL MEMORANDUM

Plaintiffs hereby submit to the court some additional legal authority in support of their claims against the Defendants, Greenbrier Coal Corporation and Parkway Processing, Inc. This will be used by Plaintiffs to supplement their closing argument.

Plaintiffs have already briefed the applicability of 33 U.S.C. § 409 and to some extend § 403, however, since the facts at trial indicate the particular applicability of 33 U.S.C. § 403, Plaintiffs wish to offer the court some exposition of the conditions of liability under this statute.

§ 403 is particularly applicable because it deals with obstruction of navigable waters. Unquestionably, the Ohio River is a navigable water of the United States and that this statute was created for the protection of persons using navigable waters. This statute provides as follows:

> Obstruction of navigable waters generally -- Excavations and filling in - Authorization by Secretary of Army. The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is

hereby prohibited and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, habor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or to the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Army] prior to beginning the same. (Mar. 3, 1899, c. 425, §§ 10, 30 Stat. 1151.)

§ 403 provides that it is unlawful for a person to erect a boom and have it obstruct a navigable waterway unless it receives permission to do so pursuant to the requirements of § 403 from the United States Army Chief of Engineers. The boom and coal conveyor which is involved in the within action which was erected to obstruct the Ohio river by Greenbrier Coal Corporation and Parkway Processing, Inc. clearly falls within §403. Furthermore, it is uncontradicted that Parkway Processing, Inc. and Greenbrier Coal Corporation had no permission to construct such an obstruction and were in fact advised to remove it.

There have been several cases which have considered issues similar to the case at hand in the context of a violation of § 403. The most notable cases are the following: *Board of Commissioners of the Port of New Orleans v. M/V Agelos Michael,* 390 F. Supp. 1012 (D.C. La. 1974). In that case a 30 foot overhang of the plaintiff's gantry crane was found to be an obstruction to navigation in violation of 33 U.S.C. § 403. The court further ruled that under § 403 a presumption of negligence per se should be imposed when a moving vessel strikes a stationary object, which is a hazard to navigation, against the owner of the fixed object when that object violates a law

designed to prevent collisions. The accident was between the plaintiff's overhanging gantry crane and a boom located on the moving vessel, the M/V Agelos Michael. The court determined that the gantry crane was not permitted by the corps of engineers. The court specifically ruled that the gantry crane created an obstruction to navigation in violation of § 403 and that the plaintiff was to be guilty of negligence per se.

(2) *City of Portland v. Luckenback Steampship Co., Inc.*, 217 F. 2d 894 (9th Cir. 1954). This case also involved a collision between a vessel and a gantry crane owned by the City of Portland. In that case the court found that the City maintained a gantry crane on a municipal dock for 2½ years. When the crane was not in use it was a jutting extension into the river. As such the gantry crane violated § 403 which prohibits the creation of obstructions in navigable waters so as to otherwise hold the city liable for damages sustained by the ship which occurred in a collision with the crane, where the city had not received permission from the corps of engineers to maintain such an obstruction. It is noteworthy that the collision occurred in daylight hours. Furthermore, the boom extended 50 feet over the river.

(3) *U.S. v. Ohio Barge Lines, Inc.*, 432 F. Supp. 1023 (W.D. Penn. 1977). The court held that a sunken barge is an obstruction under § 403. A barge either negligently or intentionally sunk in a navigable river of the United States is an obstruction to navigation.

(4) *City of Atlee v. N.W. Union Packet Co.*, 88 U.S. 389, 22 L. Ed. 619; combination boom and sail erected for boom was an unlawful obstruction; *Thom v. South Amboy N.J.*, 236 Fed. 289 (D.C. N.J. 1916), sewer pipe located in navigable water is an unlawful obstruction to navigation.

The condition of the partially sunken barge involved in the within case is also a violation of § 403. Particularly applicable is this court's own decision in *Ingram Corporation v. Ohio River Company*, 382 F. Supp. 481 (D.C. Ohio 1973); affirmed 505 F. 2d 1364 (6th Cir. 1974). This court's decision in *Ingram* also adopted the presumption of negligence on the part of the person who violates 33 U.S.C. § 403 or 409 thus shifting the burden upon that person to prove that this negligence was not the proximate cause of the Plaintiffs' injuries by a preponderance of the evidence.

Finally, the Defendants, Greenbrier Coal Corporation and Parkway Processing, Inc., have sought to allege some minor contributory negligence on the part of the passengers, Charles Ison, Denver Roof and Daniel Ott, because there was testimony to the effect that they were aware that the obstruction existed in the water. In addition to the City of Portland case wherein the court found that there was not contributory negligence in such a case, it has also been held in the case of *Three Rivers Rock Company v. The M.V. Martin,* 401 F. Supp. 15 (D.C. Mo. 1975), that a vessel is not required to remember the location of a wreck and will not be held liable for striking the wreck when it fails to remember the location. In this case the operator of the vessel itself is not the one who had knowledge of the obstruction but rather a passenger. Certainly the passenger had no duty to one who maintains an obstruction in violation of § 403 and 409 to warn the operator of a motorcraft of the obstruction. This would be especially so under the facts of this case.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been hand delivered to all counsel of record this 11th day of July, 1980.

/s/ Louis F. Gilligan

No. 82-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE GREAT SOUTHWEST FIRE

INSURANCE COMPANY, PETITIONER

v.

CHARLES L. ISON, ET AL.,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner seeks another review of the judgment entered against it in the trial court on November 25, 1981, and affirmed by the United States Court of Appeals for the Sixth Circuit on January 28, 1983. That judgment, based upon an insurance contract, requires that petitioner satisfy judgments rendered against its insured, Parkway Processing, Inc. ("Parkway"), in the underlying case. The insurance issue was tried pursuant to a supplemental complaint filed under an Ohio law which permits a direct supplemental action against the insurer of a judgment debtor.

Petitioner, a casualty insurance company, issued a general liability insurance policy to Parkway Processing, Inc. on June 3, 1977.[1] Petitioner's policy declared that Parkway was insured against hazards arising from the operation of a coal dock on the Ohio River near Ironton, Ohio.[2] On June 5, 1977, just two days after petitioner's policy was issued, a pleasure craft proceeding downstream on the Ohio River collided with a steel conveyor belt boom extending out over the water from a work barge apparatus being used as a dock. Respondents are the owner/operator and passengers on that pleasure craft who were injured in the collision.

[1]Petitioner's policy is not reproduced in the Appendix due to its size and bulk. The relevant language, cited by both the trial court and the court of appeals, is set forth in footnotes 2 and 3 below.

[2]The declarations page lists, among the risks insured, "44594-Coal dock operation by means of mechanical apparatus . . . . "

Petitioner defended its denial of coverage on the basis of a standard "watercraft" exclusion in its policy.[3]

Both the trial court and the court of appeals ruled in favor of coverage for two basic reasons: (1) The policy declared coverage for a coal docking facility of which the work barge and conveyor belt boom were an integral part; and (2), the watercraft exclusion was not applicable because the barge had been pulled partially on the bank and was therefore a "watercraft . . . ashore" under the policy.

[3]The exclusions page states that coverage shall not apply: "(e) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of

(1) any watercraft owned or operated by or rented or loaned to any insured, or

(2) any other watercraft operated by any person in the course of his employment by any insured;

but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured;"

SUMMARY OF ARGUMENT

The petition does not raise an important or substantial question for review. The trial court and the court of appeals, based upon factual considerations, correctly determined that petitioner's insurance policy declared coverage for the type of damages sustained by respondents and that such coverage was not excluded under a standard form "watercraft" exclusion.

ARGUMENT

This Court should not issue a writ of certiorari. The judgment against petitioner is based upon factual findings and does not involve any substantial question of law that merits this Court's attention. Contrary to petitioner's assertions, the decision has no impact on casualty insurance policies generally, and is certainly not contrary to logic and law.

Petitioner issued an insurance policy covering a "coal dock operation" conducted by its insured at a river dock located on the Ohio River near Ironton, Ohio. The work barge apparatus, which petitioner claims is an excluded "watercraft," was an old work barge which "was moored at the shore as a part of the coal-docking facility." (District Court's Memorandum and Order of November 25, 1981, Petitioner's Appendix, p. 13.) The boom with which the pleasure craft collided was an attachment to the work barge which supported a conveyor belt mechanism designed to carry the coal. As the trial court noted, Parkway's owners described the entire apparatus as the "coal-docking facility." (Petitioner's Appendix, p. 13.) Without the work barge, there was no "coal dock operation."

The trial court also found that "[a]t the time of the collision the barge was partially sunken and partially ashore." (District Court's Opinion of February 4, 1981, Petitioner's Appendix, p. 36.)

Petitioner maintains that the trial court and the court of appeals in effect ruled that the work barge was at the same time both a watercraft and not a watercraft. This argument is disingenuous at best.

In the underlying case, petitioner's insured conceded admiralty jurisdiction and the trial court found liability on the basis that the work barge, a "vessel" or "watercraft" as those terms are used in admiralty, did not have the required lighting. But when the same court was asked to construe the petitioner's insurance policy, it faced a completely different question in a separate area of the law.

The trial court concluded, based upon the particular declarations and exclusions in petitioner's policy, that:

> (1) "It is beyond doubt that the barge was part of the 'coal dock operation' designated by the parties as a risk that was intended to be insured."
>
> (2) "[T]he barge was not intended . . . for use as a transportation vessel . . . and . . . was in fact incapable of such use at the time of the accident."
>
> (3) The exclusion does not apply by its own terms because the work barge was partially ashore.
>
> (Petitioner's Appendix , pp. 13 and 14.)

As the trial court also noted,

> "If [petitioner's] arguments were considered in a vacuum, isolated from the facts of this case and the context of the entire insurance policy, it would merit serious consideration. But we are unable and unwilling to ignore findings that we have already made in this case."

The simple fact of the matter is that petitioner's own insurance policy is the source of its problem. In plain English, petitioner declared that it was insuring a coal dock operation which its insured's owners testified included the boom and the conveyor belt apparatus located on the work barge. In the words of the court of appeals:

> "The policy, by the terms of its declaration, was intended to cover risks arising from the operation of a coal-docking facility, and this work barge and conveyor were an integral part of such facility."

If one was unsure about the language of the declarations page, the petitioner would still be faced with declarations that conflict with the standard form "watercraft" exclusion, thus creating an ambiguity which must be construed against it. *American Ins. Co. v. L. H. Sowles Co.*, 628 F.2d 967, 969 (6th Cir. 1980); *Union Investment Co. v. Fidelity and Deposit Co. of*

Maryland, 549 F.2d 1107, 1111 (6th Cir. 1977); *Royal China, Inc. v. Travelers Indemnity, Inc.,* 497 F.2d 989, 992 (6th Cir. 1974); *Simpson v. Jefferson Standard Life Ins. Co.,* 465 F. 2d 1320, 1325 (6th Cir. 1972). Under Ohio law, the rule of liberal construction in favor of the insured and strict construction against the insurer applies with particular force when exclusionary language is involved. *American Financial Corp. v. Fireman's Fund Ins. Co.,* 15 Ohio St.2d 171, 239 N.E.2d 33 (1968); *Cincinnati Ins. Co. v. Mosley,* 41 Ohio App. 2d 113, 322 N.E. 2d 693 (Brown Co. 1974).

It is also an elemental proposition of insurance law that specific policy language, such as that used in the declarations of coverage in the instant case, controls over general standard provisions. *INA v. Wells,* 35 Ohio App. 2d 173, 300 N.E.2d 460 (Franklin Co. 1973); *David v. Texas Life Ins. Co.,* 426 S.W.2d 260 (Tex. Civ. App. 1968) (where general and specific clauses related to same thing the specific will control); *Trujillo v. State Mut. L. Assur. Co. of Worchester, Mass,* 511 P.2d 534 (Colo. App. 1973) (specific provisions control general and insurance contract may not be construed in disregard of express provisions).

Both the trial court and the court of appeals also concluded that even if petitioner overcame the express declarations of coverage and the ambiguity questions, the exclusion did not apply by its own terms. The exclusion states that it "does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured." Since the trial court found that the barge was partially ashore at the time of the collision, it is clear that the exclusion could not apply.

CONCLUSION

Rule 17 of the Supreme Court Rules states that there must be special and important reasons presented before this Court will agree to grant review on certiorari. In the instant matter, the issue presented by petitioner is neither special nor important.

The decision of the court of appeals to affirm the judgment against petitioner was based upon factual considerations. No important issue of law is presented, and petitioner's argument that all insurance policies are endangered by the judgment in this case is totally without merit.

Plaintiffs-Respondents Charles L. Ison, Daniel C. Ott and Denver Roof respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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